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JURISDICTION FOR ANNULMENT OF MARRIAGE. — To arrive at a correct solution of the problem of the jurisdiction of courts to annul marriage it is necessary, first of all, to understand the fundamental distinction between annulment and divorce. In the latter the court assumes the previous existence of the marriage status, and declares that it shall from henceforth be dissolved. If this decree be rendered by a court having jurisdiction over the status, the result is to put an end to that status for the future without affecting its existence in the past. The purpose of annulment, on the other hand, is to discover whether or not a valid marriage has ever taken place, and if this question be answered in the negative, to declare the supposed marriage a nullity.[1] The decree of nullification purports to destroy from the outset what may possibly have been a legal marriage status, together with all rights and liabilities based upon the existence of that status.[2] Since this decree is based on the original invalidity of the marriage, it is absurd for a court which recognizes that the marriage was originally a valid one to render any such decree.[3] A recent decision of the New York Court of Appeals

[1] See Ogden *v.* Ogden, [1908] P. 46, 78; Cummington *v.* Belchertown, 149 Mass. 223, 226, 21 N. E. 435, 437. This distinction is sometimes overlooked. Barney *v.* Cuness, 68 Vt. 51, 33 Atl. 897; 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 67, 73.

[2] See Roth *v.* Roth, 104 Ill. 35, 48; 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 1596–1609, 13 HARV. L. REV. 112.

[3] Courts are sometimes inclined to annul marriages somewhat hastily without much inquiry into the question of their validity by the law which created them. Avakian *v.* Avakian, 69 N. J. Eq. 89, 60 Atl. 521. Where, however, the court is made aware of the legality of the marriage by the *lex loci contractus*, it will generally recog-

annulling a valid [4] marriage performed in New Jersey between persons resident in New York seems therefore erroneous.[5] *Cunningham* v. *Cunningham*, 206 N. Y. 341.

If, however, a court is of the opinion that no real marriage ever took place,[6] it is perfectly rational for it to declare this opinion. It then becomes necessary to decide whether such a declaration can conclusively establish the proposition that the marriage status never did exist. The truth of this proposition depends upon a fact, whether or not a sovereign has created that status. If he has done so then the status has existed, and if a status were a natural object, no sovereign could expect that his declaration that he had not created it would be regarded as conclusive by other sovereigns who were convinced of its untruth. Marriage has existence as a *res*, however, only because the law recognizes it as such, and the law may treat its own creations in ways in which it would be absurd for it to deal with external objects.[7] The canon law, from which our law of marriage is derived, has always treated marriage as capable of annulment,[8] and therefore a state which derives its conception of marriage from the canon law must admit that some sovereign has jurisdiction to determine once and for all whether the marriage has

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nize its validity and refuse to annul it. Bater *v.* Bater, [1906] P. 209. *Cf.* Medway *v.* Needham, 16 Mass. 157; Stevenson *v.* Gray, 17 B. Mon. (Ky.) 193.

[4] The court suggests that the marriage may have been made voidable by a New Jersey statute. 2 N. J. GEN. STAT. 2005. This suggestion is contrary to a *dictum* of the New Jersey court. Pearson *v.* Howey, 11 N. J. L. 12, 20. It is also contrary to the interpretation which most other courts have put upon similar statutes. Goodwin *v.* Thompson, 2 Greene (Ia.) 329; Parton *v.* Hervey, 1 Gray (Mass.) 119. But *cf.* Shafher *v.* Ohio, 20 Oh. 1.

[5] New York would apparently have had jurisdiction to divorce the parties, but the decree purports to be one of annulment, and want of age is not a ground for divorce by New York law. See N. Y. CODE CIV. PROC., §§ 1742–1774. New York might also refuse to give effect to a marriage which it regarded as opposed to public policy. Kinney *v.* Commonwealth, 30 Gratt. (Va.) 858. But since this would produce the undesirable result that persons who are man and wife in one state are practically strangers in another, it should only be resorted to in extreme cases. See Medway *v.* Needham, 16 Mass. 157, 159; State *v.* Ross, 76 N. C. 242, 247. Furthermore, in annulling the marriage, the court is attempting more than merely to make it ineffectual in New York.

[6] This may be due to the fact that the apparent marriage was void or that it was voidable. A void marriage has no existence and a decree of annulment is not necessary to invalidate it. Patterson *v.* Gaines, 6 How. (U. S.) 550. It is, however, desirable that the parties should not be left to determine at their peril whether or not they are married, and accordingly decrees of annulment are universally rendered in the case of void marriages. Johnson *v.* Kincaid, 2 Ired. Eq. (N. C.) 470; Rawdon *v.* Rawdon, 28 Ala. 565. The prior validity of a voidable marriage, on the other hand, is not open to attack except in annulment proceedings. Sutton *v.* Warren, 10 Metc. (Mass.) 451; 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 259–292.

[7] This principle that the law which creates rights can later declare that they never existed is not unknown to the common law. Thus a lawful entry may be converted into trespass *ab initio*, a freedom from liability into liability from the outset by ratification, title in A. into title in B. by relation back and the like. These examples differ from annulment only in that the latter affects a *res* and not a personal right, and that the doctrine of relation back is there made the basis for the determination of the rights of the parties by municipal law, whereas in annulment the theory is invoked to give a sovereign jurisdiction to decide a question as against all the world.

[8] Aughtie *v.* Aughtie, 1 Phillim. 201; Chick *v.* Ramsdale, 1 Curt. Eccl. 34. That canon law annulment is a decree *in rem* is clear. Perry *v.* Meddowcroft, 10 Beav. 122. See Harrison *v.* Mayor of Southampton, 4 DeG. M. & G. 137, 151.

existed in the past. The sovereign who created the marriage is the most natural one for the law to clothe with such jurisdiction. The question being whether or not he has done something, it is more reasonable to expect others to take his word for it than to ask him to take the word of another as conclusive. Furthermore, the decision of the question involves the determination of the previous state of his law, as to which he has the most authoritative information. There is, no doubt, a certain hardship in forcing the parties to return to the place where the marriage ceremony occurred to discover whether or not they are really married. If, however, the sovereign of the domicile is impressed with this hardship he can dissolve by a decree of divorce the foreign marriages of his citizens which he believes to be void. Moreover, whatever may be desirable from the point of view of the parties, it seems impossible to conceive of international law as insisting that one sovereign shall allow another to determine for him what his acts have been.

The cases offer very little assistance in determining whether or not this view can be regarded as correct. By the weight of authority no decree of nullity which is not based on the law that created the marriage will be recognized by the courts which administer that law.[9] Beyond this no theory of the requisites for jurisdiction has been definitely worked out. There is a tendency, however, in the courts of the state where the parties reside,[10] as well as those where the marriage has been created,[11] to assert jurisdiction.

THE NATURE AND EFFECT OF DURESS. — If a person's hand be taken forcibly and compelled to hold a pen and write, it cannot be said that the writing is his act, since there is no expression of the will.[1] But where an act is compelled by threats only it seems impossible to contend that the act done is not the act of the person threatened; he in fact consents to do the act rather than submit to the alternative threatened.[2] Accordingly it is generally held that a contract or a deed executed under duress is voidable rather than void,[3] and that duress is of no avail against

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[9] Simonin *v.* Mallac, 2 Sw. & Tr. 67; Cummington *v.* Belchertown, *supra*; Ogden *v.* Ogden, *supra*. *Contra*, Roth *v.* Roth, *supra*.

[10] Jurisdiction was held to exist on the ground of domicile or residence in the following cases: Johnson *v.* Cooke, [1898] 2 Ir. 130; Roberts *v.* Brennan, [1902] P. 143; Roth *v.* Roth, *supra*; Barney *v.* Cuness, *supra*; Avakian *v.* Avakian, *supra*. See also Bater *v.* Bater, [1906] P. 209, 220. The Irish and Illinois decisions are perhaps based on the theory that the law of the domicile creates the marriage. The Vermont case rests on the supposed similarity between annulment and divorce. The other decisions are apparently due to the theory that it is inconvenient to force the parties to return to the state of creation to have their status determined.

[11] The following cases hold that the state where the marriage took place has jurisdiction. Sottomayer *v.* De Barros, 3 P. D. 1; Linke *v.* Van Aerde, 10 T. L. R. 426; Ogden *v.* Ogden, *supra*. In one case the court which created the marriage denied its own jurisdiction to annul it. Blumenthal *v.* Tannenholz, 31 N. J. Eq. 194.

[1] See HOLLAND, ELEMENTS OF JURISPRUDENCE, 8 ed., 93, 94.

[2] Fairbanks *v.* Snow, 145 Mass. 153, 13 N. E. 596. See TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, 67, 68.

[3] National Bank *v.* Wheelock, 52 Oh. St. 534.